Kenny Heights Development Sdn Bhd v Pentadbiran Tanah Wilayah Persekutuan, Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — LAND REFERENCE NO S3–15–03 OF 2001
MOHD HISHAMUDIN J
1 SEPTEMBER 2007

Civil Procedure — Parties — Intervention — Applicant filed objection with respect to compensation paid in a land acquisition — By reason of a privatization agreement SPRINT applied to intervene as any increase in award of compensation would be borne by SPRINT — Compensation as a matter of law had to be paid by Highway Authority Malaysia not by SPRINT — Whether SPRINT's legal interest would be directly affected by any increase of award

Evidence — Adverse inference — Confidential documents — Privatization agreement between government and SPRINT — SPRINT tendered only portions of the agreement — Best evidence rule requires entirety of agreement to be tendered

In the year 2000, the State Authority of the Federal Territory of Kuala Lumpur acquired an area of land belonging to Kenny Heights Development Sdn Bhd ('Kenny Heights') under s 22 of the Highway Authority Malaysia (Incorporation) Act 1980 ('HAMA') read together with the Land Acquisition Act 1960 ('LAA') to build a highway — the SPRINT Highway. The acquisition by the State Authority was made on behalf of a statutory authority known as the Highway Authority Malaysia (or the Lembaga Lebuhraya Malaysia — 'LLM') as the land was needed for the purpose of the functions of the LLM. The compensation was paid to Kenny Heights by LLM in accordance with s 22(2) of the Highway Authority Act (HAA). Kenny Heights, dissatisfied with the award invoked s 37 of the LAA, filed an objection with respect to the amount of the award. The Land Administrator accordingly as required by s 38 of the LAA referred the objection to the High Court. Before the land reference could be heard, SPRINT filed a summons in chambers applying to intervene in the land reference proceeding as a co-respondent. SPRINT contended that they were entitled to intervene because any increase in award of compensation to Kenny Heights made by the court would be borne by them (ie PRINT) by reason of a privatization agreement entered into between SPRINT and the Government.

Held:

(1) The effect on SPRINT, if the court were to increase the award in favour of Kenny Heights, would only be an indirect effect. This was because the

compensation to Kenny Heights as a matter of law had to be paid by LLM to Kenny Heights by virtue of s 2(2) of the Highway Authority Act, and not by SPRINT. For subsection (2) said that the compensation 'shall be paid by the authority.' '[A]uthority' here means the LLM. Thus the party whose legal interest would be directly affected by any increase of the award, if at all made by this court, would be LLM and not SPRINT (see para 13).

(2) SPRINT had failed to prove the existence of the contractual obligation. In fact SPRINT even failed to prove the existence of the privatisation agreement. The legal burden was on SPRINT to prove on a balance of probabilities that such a contractual obligation did exist; since SPRINT was invoking O 15 r 6(2)(b) of the Rules of the High Court 1980. SPRINT was not tendering the agreement in its entirety: SPRINT was only tendering portions (containing selected clauses) of the agreement. The best evidence rule, however, required that the privatization agreement (or concession agreement) itself in its entirety be produced to court for the examination by the court. This had not been done. It is axiomatic that any provision of an agreement (for example a provision relating to the legal obligation on the part of SPRINT to pay compensation to a landowner whose land was acquired) which a party was inviting the court to interpret could not be construed in isolation: it must be construed in the context of the agreement as a whole (see para 14).

(3) The confidentiality clause of the agreement which prohibits SPRINT from disclosing the entire agreement was not an absolute prohibition: the parties to the agreement may by mutual agreement disclose the agreement to a third party. Secondly, when there was a request by a party to the agreement for disclosure to a third party, the other party to the agreement could not withhold agreement to the request unreasonably. In other words, on the issue of confidentiality, parties must act rationally and reasonably. However, in the present case it would appear that SPRINT itself was not keen to tender the whole agreement to the court. Since SPRINT itself was not prepared to disclose the entire agreement then they must be prepared for the consequence of an adverse inference by the court (see para 16).

[Bahasa Malaysia summary

Pada tahun 2000, Pihak Berkuasa Negeri Wilayah Persekutuan Kuala Lumpur memperolehi satu kawasan kepunyaan Kenny Heights Development Sdn Bhd ('Kenny Heights') di bawah s 22 Akta Lembaga Lebuhraya Malaysia (Perbadanan) 1980 ('ALLM') dibaca bersama dengan Akta Pengambilan Tanah 1960 ('APT') untuk membina satu lebuhraya — Lebuhraya SPRINT. Pengambilan oleh Pihak Berkuasa Negeri dibuat bagi pihak satu autoriti berkanun yang dikenali sebagai Lembaga Lebuhraya Malaysia ('LLM') oleh kerana tanah tersebut diperlukan untuk tujuan menjalankan fungsi-fungsi LLM. Pampasan yang dibayar kepada Kenny Heights oleh LLM mengikut s 22(2) Akta Lembaga Lebuhraya ('ALL'). Kenny Heights, tidak berpuas hati dengan award tersebut telah menggunakan s 37 APT, memfailkan satu bantahan berhubungan dengan amaun award tersebut. Pentadbir

Tanah dengan itu perlu, mengikut s 38 APT merujuk bantahan tersebut kepada Mahkamah Tinggi. Sebelum rujukan tanah tersebut dapat didengar, SPRINT memfailkan satu saman dalam kamar untuk mencelah dalam prosiding rujukan tanah tersebut sebagai responden bersama. SPRINT menegaskan bahawa mereka berhak untuk mencelah oleh kerana sebarang kenaikan award pampasan kepada Kenny Heights yang diperintahkan Mahkamah akan dibayar oleh mereka (iaitu SPRINT) atas sebab perjanjian penswastaan yang dimasuki di antara SRINT dan Kerajaan.

Diputuskan:

(1) Kesan terhadap SPRINT, sekiranya Mahkamah menaikkan award memihak Kenny Heights, hanya satu kesan secara tidak langsung. Ini adalah kerana pampasan kepada Kenny Heights berdasarkan undang-undang perlu dibayar oleh LLM kepada Kenny Heights mengikut s 22(2) ALL, dan bukannya oleh SPRINT. Oleh kerana sub-s(2) menyatakan bahawa pampasan 'shall be paid by the authority.' '[A]uthority' di sini bermaksud LLM. Dengan itu pihak di mana kepentingan undang-undang akan dijejaskan secara langsung terhadap sebarang kenaikan award, sekiranya ada yang diperintahkan oleh mahkamah ini, adalah LLM dan bukannya SPRINT (lihat perenggan 13).

(2) SPRINT telah gagal membuktikan kewujudan satu obligasi kontraktual. Sebenarnya SPRINT gagal membuktikan kewujudan perjanjian penswastaan. Beban undang-undang adalah pada SPRINT untuk membuktikan atas imbangan kebarangkalian bahawa obligasi kontraktual yang dikatakan tersebut wujud; oleh kerana SPRINT menggunakan A 15 k 6(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980. SPRINT tidak membentangkan keseluruhan perjanjian tersebut: SPRINT hanya membentangkan sebahagian (yang mengandungi klausa-klausa pilihan) perjanjian tersebut. Akan tetapi rukun keterangan paling baik memerlukan perjanjian penswastaan dikemukakan kepada mahkamah untuk pemeriksaan mahkamah. Ini tidak dilakukan. Tidak dapat disangkal bahawa sebarang peruntukkan di dalam sesuatu perjanjian (contohnya peruntukan berhubung dengan obligasi undang-undang pada pihak SPRINT untuk membayar pampasan kepada pemilik tanah di mana tanahnya diperoleh) yang satu pihak ingin mahkamah mentafsirkan tidak boleh ditafsirkan secara berasingan: ia mesti ditafsirkan di dalam konteks perjanjian secara keseluruhannya (lihat perenggan 14).

(3) Klausa kerahsiaan perjanjian yang menghalang SPRINT daripada mendedahkan keseluruhan perjanjian tersebut bukannya satu larangan mutlak: pihak-pihak kepada perjanjian tersebut boleh secara bersama-sama bersetuju mendedahkan perjanjian tersebut kepada pihak ketiga. Keduanya, apabila terdapat satu permintaan daripada satu pihak kepada perjanjian tersebut untuk pendedahan kepada pihak ketiga, pihak yang satu lagi kepada perjanjian tersebut tidak boleh menolak permintaan tersebut secara tidak munasabah.

Dalam perkataan yang lain, atas isu kerahsiaan, pihak-pihak mesti bertindak secara rasional dan munasabah. Akan tetapi dalam kes ini, ia nampak seperti SPRINT sendiri tidak begitu mendesak untuk membentangkan keseluruhan perjanjian tersebut maka mereka patut menerima akibat satu inferens menentang oleh mahkamah (lihat perenggan 16).]

Notes

For a case on confidential documents, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 128.

For cases on intervention, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5003–5041.

Cases referred to

Pegang Mining Company Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (refd)
Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1992] 2 MLJ 63 (refd)

Legislation refered to

Highway Authority Malaysia (Incorporation) Act 1980 ss 2, 3, 11, 22
Land Acquisition Act 1960 ss 8, 37, 38
Rules of the High Court 1980 O 15 r 6(2)(b)

Joy Appukuttan (HL Tiong with him) (SK Yeoh & Partners) for the applicant.
Dato' Zaki Yassin (Senior Federal Counsel, Attorney General's Chambers) for the respondent.
Simon Hue (CM Phang & Co) for the intended intervener.

Mohd Hishamudin J:

[1] This is an appeal by the applicant, Kenney Heights Development Sdn Bhd ('Kenny Heights'), in this land reference proceeding against the decision of the learned Deputy Registrar in allowing the applicant/proposed intervener, Sistem Penyuraian Trafik KL Barat Sdn. Bhd. ('SPRINT'), to intervene in this proceeding.

[2] I have allowed the appeal with costs. In my judgment, the learned Deputy Registrar, with respect, had erred in law when she allowed SPRINT's application to intervene in the proceedings pursuant to O 15 r 6(2)(b) of the Rules of the High Court 1980 ('the RHC').

[3] The following are my grounds for allowing the appeal.

[4] But, first, I shall set out the brief background facts of the present case. In the year 2000, the State Authority of the Federal Territory of Kuala Lumpur acquired an area of land in the Federal Territory of Kuala Lumpur belonging to Kenny Heights under s 22 of the Highway Authority Malaysia (Incorporation) Act 1980 ('Highway Authority Act') read together with the Land Acquisition Act 1960 ('the Land

A Acquisition Act'). The purpose of the acquisition was to build a highway — the SPRINT Highway. In the Gazette Notification (No. 1634 dated 17 February 2000) published pursuant to s 8 of the Land Acquisition Act 1960, the purpose of the acquisition is stated as:

B Projek Lebuhraya Skim Penyuraian Trafik Kuala Lumpur — Barat (Pakej A: Peringkat 2)

[5] The acquisition by the State Authority was made on behalf of a statutory authority known as the Highway Authority Malaysia (or the Lembaga Lebuhraya Malaysia — 'LLM') as the land was needed for the purpose of the functions of the LLM. The Highway Authority Malaysia (or LLM) is a body corporate established C under s 2 of the Highway Authority Malaysia (Incorporation) Act 1980. The functions of the LLM are set out by section 11 of the Highway Authority Act. Among the functions of the LLM are:

(a) to supervise and execute the design, construction and maintenance of highways as determined by the Federal Government;

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(b) to supervise and execute the design, construction and maintenance of rest and service areas and other facilities that may be deemed necessary along highways as determined by the Federal Government;

(c) to collect toll from the users of highways and other dues from facilities along E highways;

[6] Under s 22(1) of the Highway Authority Malaysia (Incorporation) Act 1980 it is provided:

F General power to acquire land.

(1) Where any immovable property, not being State land or reserved land, is needed to be acquired for the purpose of this Act and cannot be acquired by agreement, such property may be acquired in accordance with the provisions of any written law relating to the acquisition of land for a public purpose for the time being in force in the State in which the property is situated and any declaration required under any such written G law that the land is so needed may be made notwithstanding the compensation is to be paid out of the funds of the Authority, and the said declaration shall have effect as if it were a declaration that the land is needed for a public purpose made in accordance with the said written law.

(2) Expenses and compensation in respect of any immovable property acquired under this section shall be paid by the authority.

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[7] As the acquisition is pursuant to the Highway Authority Act read together with the Land Acquisition Act, I must here pause for a moment to point out that it is significant to note that there is nothing in the Highway Authority Act that enables I LLM or the Government to privatize the functions of LLM (constructing and maintaining the highway and collecting tolls) to a private entity such as SPRINT. I am somewhat impelled to raise this point at this juncture for the reason that in spite

of the fact that the Kenny Height's land was acquired for the purpose of LLM (this is a common agreed fact), yet there is the contention of SPRINT that there is a privatization agreement in existence between itself and the Government (curiously, although the acquisition of the land is meant for LLM, and LLM was paying the compensation to Kenny Heights, yet LLM is not a party to the alleged privatization agreement) regarding the construction and maintenance of a highway and the collecting of tolls on the very land that had been acquired for the purpose of LLM.

[8] Anyway, reverting to the acquisition process in the present case, in accordance with the provisions of the Land Acquisition Act, an inquiry was held by the Land Administrator; and Kenny Heights, at the conclusion of the inquiry, was awarded RM21,553,000 as compensation. The compensation was paid to Kenny Heights by LLM in accordance with s 22(2) of the Highway Authority Act. Kenny Heights, dissatisfied with the award, and invoking s 37 of the Land Acquisition Act, filed an objection with respect to the amount of the award. The Land Administrator accordingly as required by s 38 of the Land Acquisition Act referred the objection to the High Court. Hence, the present land reference proceeding before me.

[9] However, before this land reference could be heard, SPRINT filed a summons in chambers applying to intervene in the land reference proceeding as a co-respondent. This application by SPRINT was made under O 15 r 6(2)(b) of the Rules of the High Court 1980 which reads:

> Misjoinder and non-joinder of parties.
>
> (1) …
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> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —
>
> (a) …
>
> (b) Order any of the following persons to be added as a party, namely —
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> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
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> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

[10] In the landmark Privy Council case of *Pegang Mining Company Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 it was held that in order to be entitled to intervene in a proceeding the intending party must satisfy the court that the order that the court

might make would directly affect his legal interest (see also the Supreme Court case of *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63.)

[11] SPRINT contends that they are entitled to intervene because any increase in award of compensation to Kenny Heights that this court might make at the conclusion of this land reference proceeding would be borne by them (ie SPRINT) by reason of a privatization agreement entered into between SPRINT and the Government. Hence, it is argued, SPRINT's legal interest would be directly affected by any increase in award to Kenny Heights that this court might make at the conclusion of this proceeding.

[12] In the supporting affidavit, it is averred by SPRINT that the SPRINT Highway project was privatized to them by the Government of Malaysia via a privatization (or concession) agreement. In other words, the Government confers on SPRINT the right to construct and maintain the highway and to collect tolls from the highway users. It is further averred that in the privatization (concession) agreement, entered into between SPRINT and the Government, SPRINT undertakes to bear the cost of any land acquired for the purpose of the highway project. This means that any compensation money that was paid out by LLM to Kenny Heights would come from SPRINT. In other words, according to SPRINT, LLM is merely a conduit to pass money from them to Kenny Heights.

[13] In my judgment, on the supposition that there was a privatization agreement between SPRINT and the Government of Malaysia, I am unable to accept the argument advanced by the learned counsel for SPRINT that any order that I might make to increase the compensation payable to Kenny Heights would *directly* affect the legal interest of SPRINT by reason of the said privatization agreement. In my view, the effect on SPRINT, if the court were to increase the award in favour of Kenny Heights, would only be an *indirect* effect. This is because the compensation to Kenny Heights as a matter of law has to be paid by LLM to Kenny Heights by virtue of s 22(2) of the Highway Authority Act, and not by SPRINT. For subsection (2) says that the compensation 'shall be paid by the authority.' '[A]uthority' here means the LLM. Thus the party whose legal interest would be directly affected by any increase of the award, *if* at all made by this court, would be LLM and not SPRINT.

[14] But in the first place, is the existence of such a contractual obligation on the part of SPRINT (the contractual obligation to pay the compensation to Kenny Heights) proven? In my view, SPRINT has failed to prove the existence of the contractual obligation. In fact SPRINT even fails to prove the existence of the privatisation agreement. It is my judgment that the legal burden is on SPRINT to prove on a balance of probabilities that such a contractual obligation does exist; since SPRINT is invoking O 15 r 6(2)(b) of the RHC. Now, SPRINT in its endeavour to prove the existence of such a contractual obligation seeks to tender in evidence the alleged privatisation agreement; but the problem is, SPRINT is not tendering the agreement in its entirety: SPRINT is only tendering portions (containing selected clauses) of the agreement. The best evidence rule, however, requires that the privatization agreement (or concession agreement) itself in its entirety be produced

to court for the examination by the court. However, in the present case, as I have just said, this has not been done. In my judgment, it is axiomatic that any provision of an agreement (for example a provision relating to the legal obligation on the part of SPRINT to pay compensation to a landowner whose land was acquired) which a party is inviting the court to interpret cannot be construed in isolation: it must be construed in the context of the agreement as a whole. Indeed it is all the more imperative in the present case where —

(a) in the light of the provisions of ss 3, 11 and 22 of the Highway Authority Act pertaining to the functions of LLM in relation to the design, construction and maintenance of highways;

(b) in the light of the purpose of the acquisition of the Kenny Heights' land (that is for the purpose of LLM — and not for the purpose of SPRINT);

(c) in the light of the duty imposed on LLM (and not on SPRINT) to make compensation to Kenny Heights; and

(d) in the light of the absence of a provision in the Highway Authority Act conferring any right or power either on LLM or the Government to privatize the highway,

there is, to my mind, a serious doubt as to the validity of the privatization agreement that SPRINT has made with the Government.

[15] The reason given by SPRINT for not tendering the privatization agreement in its entirety is because of the confidentiality clause of the agreement which prohibits SPRINT from disclosing the entire agreement. The confidentiality clause reads:

> 33.1 Confidentiality
>
> This Agreement and all matters pertaining hereto shall be considered a confidential matter and shall not be disclosed to any third party without prior mutual agreement (which agreement shall not be unreasonably withheld) unless the same is required by law.

[16] However, it is pertinent to observe that under the above clause, firstly, the prohibition to disclose is not an absolute prohibition: the parties to the agreement may by mutual agreement disclose the agreement to a third party (say, for example, to the court). Secondly, when there is a request by a party to the agreement for disclosure to a third party (say, to the court), the other party to the agreement cannot withhold agreement to the request unreasonably. In other words, on the issue of confidentiality, parties must act rationally and reasonably. However, in the present case it would appear that SPRINT itself is not keen to tender the whole agreement to the court as shown by para 2 of the letter from the Ministry of Public Works dated 8 June 2004 to SPRINT. For, by para 2 of the said letter, it appears that SPRINT had requested from the Ministry permission to disclose only certain parts of the agreement to the court. Why was SPRINT selective? Why didn't SPRINT apply to the Ministry of Public Works for the disclosure of the entire agreement to the court? I fail to see any rational basis for SPRINT to assume that the Ministry would withhold its agreement to a full disclosure of the agreement to the court.

Since SPRINT itself is not prepared to disclose the entire agreement then they must be prepared for the consequence of an adverse inference that this court will make.

Order accordingly.

Reported by Sally Kee